

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

RICKY L. TILLMAN, JR., surviving son)
of Ricky L. Tillman, Sr., deceased)

Plaintiff,)

v.)

Case No. 1:20-CV-00178-SNLJ

BNSF RAILWAY COMPANY,)

and)

DONALD HANDY)

and)

TITUSAN TOWNSEND, deceased by)
his Defendant Ad Litem)

Defendants.)

PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL
WITHOUT PREJUDICE OF COUNT II OF HIS PETITION/COMPLAINT

COMES NOW Plaintiff by counsel, Cook, Barkett, Ponder & Wolz, L.C., and moves this Honorable Court for a voluntary dismissal without prejudice of Count II of his Petition/Complaint which seeks damages for aggravating circumstances.

Although Plaintiff believes that Count II, as pleaded, contains facts sufficient to support his claim for damages for aggravating circumstances, rather than engage in a prolonged dispute over the sufficiency of the allegations which may be unnecessary for the

Court to resolve, Plaintiff agrees to a voluntary dismissal without prejudice of Count II of his Petition/Complaint.

A dismissal without prejudice is the appropriate remedy in that it would be inequitable for the Court to dismiss Count II with prejudice, as requested by Defendant BNSF, based on a federal pleading rule which did not govern the petition which was initially filed in state court. It was not until the case was removed by Defendant BNSF and the Court denied Plaintiff's Motion for Remand that the federal pleading standards became relevant.

Further, a voluntary dismissal without prejudice satisfies the needs of all parties in that it dismisses a claim that Defendant BNSF contends is defective on its face while still leaving Plaintiff the option to seek leave to amend his Complaint if, after engaging in discovery, Plaintiff believes he has developed facts which more clearly support a claim for aggravating circumstances damages.

Plaintiff's Memorandum of Law in Support this motion is being filed contemporaneously herewith and incorporated herein by reference.

WHEREFORE, Plaintiff respectfully and voluntarily agrees to a dismissal without prejudice of Count II of his Petition/Complaint and prays that the Court enter its order Dismissing Without Prejudice Count II of his Petition/Complaint and for such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

COOK, BARKETT, PONDER & WOLZ, LC

By: /s/ Matthew D. Glenn

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April 2021, the foregoing was filed electronically using the Court's CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Matthew D. Glenn